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Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR [C.G.]

CRIMINAL APPEAL NO. 539/2005.

APPELLANT ACCUSED (In ~~Jail~~) : Sahdev ~~Jainu~~, S/o Crus Vashu Netam, Aged about 25 yrs. R/o Village-Kalari Padar Mundaguda, Tah Umarkote, Distf-Navrangpur (Orissa.)

30/06/05

VERSUS

RESPONDENT : State of Chhattisgarh, Through: Police Station Frezerpur, Distt. Bastar (C.G.)

CRIMINAL APPEAL U/S 374 OF CODE OF CRIMINAL PROCEDURE.

SENTENCE

(1)

(25)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Cr.Appeal No.434/2005

Jayanu

Versus

State of Chhattisgarh

AND

Cr. Appeal No.539/2005

Sahdev

Versus

State of Chhattisgarh

Post for orders : 29.03.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

(26)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.434/2005

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Cr.Appeal No.434/2005

Jayanu

Versus

State of Chhattisgarh

AND

Cr. Appeal No.539/2005

Sahdev

Versus

State of Chhattisgarh

Shri Manoj Mishra, Counsel for the appellants.

Shri U.K.S.Chandel, P.L. for the State.

JUDGMENT

(Delivered on 29th day of March 2006)

Criminal Appeal No.434/2005 preferred by appellant Jayanu and Criminal Appeal No.539/2005 preferred by Sahdev are directed against the judgment dated 31.03.2005 delivered by Shri Yogesh Mathur, 3rd Additional Sessions Judge, Bastar place: Jagdalpur in Sessions Case No.197/2004 whereby the appellants above named were convicted under Sections 376(2)(g) and 341 read with Section 34 I.P.C. and were sentenced to undergo rigorous imprisonment for ten years and a fine of Rs.2,000/- and in default to undergo additional rigorous imprisonment for six months each under Section 376(2)(g) I.P.C. and to undergo simple imprisonment for one month each under

Section 341 read with Section 34 I.P.C. This judgment shall govern both the aforesaid appeals.

2. Briefly stated the prosecution story is that on 3.5.2004 the prosecutrix, resident of village Dogam, Police Station Frazerpur, had started for village Parpa at about 3 '0' clock in the afternoon to her relative Smt. Sardei P.W.2, the village Kotwarin of Parpa. At about 5.00 P.M. in village Tusel the prosecutrix went to the house of co-accused Ratan since she knew him from before. On the next day i.e. 4.5.2004 at about 3.00 P.M. she left for village Parpa. At that time, the appellant-Ratan forcibly took her to the house of appellant-Jayanu in Village Tusel. The appellant-Sahadev was already there. After locking the prosecutrix inside the house with the appellants-Jayanu and Sahadev, co-accused Ratan ran away. Both the appellants-Jayanu and Sahadev committed rape on the prosecutrix one after the other inside the house. At about 6.30 P.M. on 4.5.2004 the prosecutrix, on the pretext of attending a call of nature, went away and reached the house of Smt. Sardei P.W.2, the village Kotwarin but did not narrate the incident to her on that day. On 5.5.2004 the prosecutrix informed the incident to Smt. Sardei P.W.2, Harischandra, Mahadev, Chumman and her mother Smt. Kamla Bai P.W.3 and lodged F.I.R. Ex.P.1 at Police Station Frazerpur.

3. On being sent for medical examination, Dr. Smt. Shanti Pandey P.W.10 examined her but did not find any evidence of violence on her person. She found an old vaginal tear. During examination, the prosecutrix did not complain of any kind of pain. It was opined that she was habituated of sexual intercourse and there was no evidence of forceful intercourse on her. Dr. Somesh Pandey P.W.9 examined the appellant-Sahadev on 20.06.2004 and Dr. J.Gupta P.W.7 examined the appellant-Jayanu on 7.5.2004. Both appellants-Jayanu and Sahdev

were found capable of performing sexual intercourse. Ossification test was conducted on the prosecutrix for determination of her age. Dr. Govind Singh P.W.6 who conducted Radiological examination opined that the age of the prosecutrix was between 14 to 17 years. After completion of investigation, the appellants were prosecuted under Section 376(2)(g) and 342 I.P.C.

4. The appellants abjured the guilt, pleaded innocence and led no evidence in defence. The prosecution examined as many as 14 witnesses. The learned trial Judge relying upon the evidence led by the prosecution convicted the appellants-Jayanu and Sahdev and sentenced them as aforesaid in para 1 while acquitting the appellant-Ratan.

5. Shri Manoj Mishra, learned counsel for the appellants has assailed the conviction of the appellants on the ground that the evidence led by the prosecution did not establish the guilt of the appellants under Section 376(2)(g) and 341 I.P.C. It was argued that the medical evidence did not support the testimony of the prosecutrix who was a wholly unreliable witness. On the other hand, Shri U.K.S.Chandel, learned Panel Lawyer argued in support of the impugned judgment.

6. Having heard the rival contentions, I have perused the record of Sessions Case No.197/2004. The testimony of the prosecutrix was recorded on 8.9.2004 i.e. a period of about 4 months after the occurrence. The trial Court assessed the age of the prosecutrix as 19 years. . In the F.I.R. Ex.P.1 also the age of the prosecutrix was shown as 19 years. Dr. Govind Singh P.W.6 has proved the ossification test report Ex.P.4 of the prosecutrix. In the ossification test the age of the prosecutrix was estimated to be between 14 to 17 years. Considering the legally permissible margin of error "on either side" in the estimation

of age recorded under the ossification test, it cannot be ruled out that the prosecutrix was aged about 19 years on the date of occurrence.

7. The prosecutrix stated that on the date of occurrence while she was going to village Parpa, the appellants and the co-accused Ratan took her to village Sargipal in a house and all of them committed rape on her one after the other. This is sharply contradicted by the F.I.R. Ex.P.1 in which she did not mention that she was taken to the village Sargipal by both the two appellants and co-accused Ratan, but she had stated that she went along with Ratan to his house in village Tusel at about 5.00 P.M. since appellant-Ratan was known to her. In para-7 of her testimony, she has stated that none of the appellants were known to her on the date of occurrence. She has also denied having stayed with the appellant-Ratan for the night while going to village Parpa.

8. In the F.I.R. Ex.P.1, the prosecutrix had stated that on the next date i.e. 4.5.2004 co-accused Ratan had forcibly taken her to village Tusel in the house of the applicant-Jayanu. However, in her testimony, she did not depose any such thing. In the F.I.R. she had narrated that only the appellants-Jayanu and Sahdev had committed rape on her while appellant Ratan had, after bolting the door from outside ran away. In her testimony, the prosecutrix stated that both the appellants and co-accused Ratan had committed rape on her due to which she fell unconscious. In the F.I.R. the prosecutrix had reported that on the same day at about 6.30 P.M. she went away on the pretext of attending a call of nature but in her testimony she stated that the incident of rape is at night and she regained consciousness on the

testimony she falsely implicated co-accused Ratan for committing rape on her.

9. The F.I.R. Ex.P.1 shows that Smt. Sardei P.W.2, the village Kotwarin is the relative of the prosecutrix but the prosecutrix did not inform her about the incident on reaching village Parpa. It was stated therein that on 5.4.2004 the prosecutrix had accompanied Smt. Sardei P.W.2 to the Police Station Frazerpur for lodging the F.I.R. However, Smt. Sardei P.W.2 had stated that she has absolutely no knowledge about the occurrence since the prosecutrix who had visited her did not inform anything to her.

10. Another witness Smt. Kamla Bai P.W.3, who is the mother of the prosecutrix, has also stated that after attending the function at Smt. Sardei's house, the prosecutrix had gone to her house at Parpa but did not inform anything to her. Her testimony that appellants-Jayanu and Sahdev and co-accused Ratan came to her house on the next date and informed her that they had committed gang rape on the prosecutrix is wholly unreliable. The prosecutrix has in paragraph 2 of her testimony clearly admitted that she did not inform about the incident of rape to any person in the village. Although in the F.I.R. Ex.P.1 the name of the appellants and co-accused Ratan were mentioned, the prosecutrix admitted in paragraph 8 that she did not know the appellants or co-accused by their names since she had never seen them prior to the date of occurrence. Her testimony that both the appellants and co-accused Ratan forcibly gagged her mouth and took her to a distance of about two kilometers at about 3.00 P.M. in Sargipal is rendered wholly unreliable, since not corroborated by the F.I.R. Ex.P.1.

11. In paragraph 11 of her testimony she has stated that due to rape she had sustained injury on her chest and on both cheeks due to

teeth bite and also on her legs since rape was committed upon her on the plain soil. She has also stated in paragraph 11 that due to rape there was vaginal bleeding. However, this part of the testimony is also not corroborated by Dr. Smt. Shanti Pandey P.W.10 who did not find any mark of violence on the person of the prosecutrix and found that she was habituated to sexual intercourse. Although the prosecutrix has stated that she was pregnant on the date of occurrence and a miscarriage had taken place 2 - 3 days after the occurrence, yet Dr. Smt. Shanti Pandey P.W.10 did not find that the prosecutrix was pregnant at the time of medical examination.

12. From the foregoing discussion, it is absolutely clear that the prosecutrix is a wholly unreliable witness. Her testimony is full of contradictions. It is not corroborated either by Smt. Sardei P.W.2 or her mother Smt. Kamla Bai P.W.3 and also by the medical evidence of Dr. Smt. Shanti Pandey P.W.10. In the facts and circumstances of the case, conviction of the appellants-Jayanu and Sahdev on basis of such wholly unreliable testimony of the prosecutrix cannot be sustained in the eye of law.

13. In the result Criminal Appeal No.434/2005 preferred by the appellant-Jayanu and Criminal Appeal No.539/2005 preferred by the appellant-Sahdev are allowed. Conviction of the appellants-Jayanu and Sahdev under Section 376(2)(g) and 341 read with Section 34 I.P.C. and the sentence awarded thereunder are set aside. The appellants are acquitted and shall be set at liberty forthwith, if not required in any other case. Fine if paid shall be refunded to the appellants.

Sd/-
Dilip Raosaheb Deshmukh
Judge